

David B. Goodwin (Cal. Bar No. 104469)  
Sylvia Huang (Cal. Bar No. 313358)  
COVINGTON & BURLING LLP  
415 Mission Street, Suite 5400  
San Francisco, California 94105-2533  
Telephone: + 1 (415) 591-6000  
Facsimile: + 1 (415) 591-6091  
Email: dgoodwin@cov.com; syhuang@cov.com

Attorneys for UNITED POLICYHOLDERS

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

STEVEN BAKER AND MELANIA KANG  
D/B/A CHLOE'S CAFE,

Plaintiffs,

v.

OREGON MUTUAL INSURANCE  
COMPANY,

Defendant.

CASE NO: 3:20-cv-05467-LB

**REPLY IN SUPPORT OF MOTION OF  
*AMICUS CURIAE* UNITED  
POLICYHOLDERS TO SUBMIT  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN OPPOSITION TO  
DEFENDANT'S MOTION TO DISMISS  
AND, IN THE ALTERNATIVE,  
MOTION FOR SUMMARY JUDGMENT**

Date: December 17, 2020

Time: 9:30 a.m.

Location: Magistrate Judge

Laurel Beeler, Via Webinar

**UP'S REPLY IN SUPPORT OF MOTION FOR  
LEAVE TO FILE THE PROPOSED *AMICUS CURIAE*  
MEMORANDUM**

CASE NO: 3:20-cv-05467-LB

1 In considering Oregon Mutual Insurance Company’s motion to dismiss, this Court confronts an  
2 issue of critical importance for policyholders affected by COVID-19 and related public safety orders:  
3 Does a government closure order that deprives a policyholder of the use of covered property constitute  
4 “direct physical loss or damage.” Given the potential significance of this Court’s ruling, United  
5 Policyholders (“UP”) seeks to fulfill the long-accepted role of *amici curiae* to bring to the Court’s attention  
6 relevant California authority bearing on this issue. Oregon Mutual urges this Court to deny UP’s motion  
7 for leave to file the proposed *amicus* brief, and essentially forego consideration of the many apposite  
8 California state precedents UP has submitted to help guide the Court’s evaluation of California law.  
9 Oregon Mutual’s position is counterproductive and lacks basis.

10 There is no question that UP has a compelling interest in this case. UP is a consumer advocacy  
11 group that acts and speaks on behalf of thousands of insurance policyholders in California and across the  
12 country. The outcome of the Court’s decision could broadly affect the scope of coverage for losses that  
13 many of these policyholders may incur from the COVID-19 pandemic and attendant public safety orders.  
14 Even setting aside UP’s direct interest in the present case, courts liberally permit an *amicus curiae* to brief  
15 a matter of public interest, where the amicus offers different information or perspective that can help the  
16 court in resolving the issues presented. *See California by & through Becerra v. United States Dep’t of the*  
17 *Interior*, 381 F. Supp. 3d 1153, 1164 (N.D. Cal. 2019); *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir.  
18 1982), *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995); *Pickup v. Brown*, No. CV  
19 S-12-2497 KJM-EFB, 2012 WL 12965030, at \*1 (E.D. Cal. Nov. 21, 2012). As to Oregon Mutual’s other  
20 complaint, UP’s *amicus* brief—filed 10 days before the hearing on Oregon Mutual’s motion—is timely.

21 This Court should grant leave to UP to file its *amicus curiae* memorandum.

## 22 ARGUMENT

23 Oregon Mutual concedes that it is appropriate for this Court to grant UP’s motion for leave to  
24 file an *amicus* brief if (1) UP is affected by the ruling *or* (2) if UP’s *amicus* brief presents a different  
25 perspective on the issues to the Court. *See* Opp. at 2. Both these grounds are satisfied.

1 “District courts frequently welcome amicus briefs from non-parties concerning legal issues that  
2 have potential ramifications beyond the parties directly involved.” *Ctr. for Biological Diversity v.*  
3 *Jewell*, 2013 WL 4127790, at \*4 & n.40 (N.D. Cal. Aug. 9, 2013) (quoting *NGV Gaming, Ltd. v.*  
4 *Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005)). Such is the case here.  
5 This Court’s adjudication of the recurring legal issue of whether the perils posed by the coronavirus  
6 pandemic constitute covered “physical loss or damage” may bear directly on the prospects of insurance  
7 recovery for pandemic-affected policyholders throughout California (and beyond). As a policyholder  
8 advocacy organization, UP has a strong interest in ensuring that policyholders receive the full amount of  
9 insurance coverage available to them under the insurance policies that insurers like Oregon Mutual  
10 prepared and sold to them. Indeed, UP serves as an information resource for individual and commercial  
11 insurance consumers throughout the United States and has assisted individual and small business  
12 policyholders throughout the United States with thousands of insurance claims over its almost 30 years  
13 of existence, including in the wake of large-scale national disasters. UP has also specifically been  
14 engaged to assist business owners around the country whose operations have been affected by COVID-  
15 19 and public safety orders.

16 Further, “[a]n amicus brief should normally be allowed” when it “has unique information or  
17 perspective that can help the court beyond the help that the lawyers for the parties are able to provide.”  
18 *Pickup v. Brown*, No. CV S-12-2497 KJM-EFB, 2012 WL 12965030, at \*1 (E.D. Cal. Nov. 21, 2012)  
19 (quoting *Cnty. Ass’n for Restoration of Env’t (CARE) v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975  
20 (E.D. Wash. 1999)). Again, that is precisely the case here. As a policyholder advocate with deep  
21 insurance industry knowledge that has filed *amicus* briefs in federal and state appellate courts in more  
22 than 450 cases, including more than 40 published appellate decisions applying California law, UP’s  
23 *amicus* brief represents a different perspective from that of Plaintiff Chloe Cafe in this case. UP’s brief  
24 also offers a helpful perspective because UP’s briefs have been cited with approval by the California  
25 Supreme Court, the highest tribunal enunciating the law that governs this case.

1 It bears adding that, while insurers are “repeat players” in coverage litigation, most policyholders  
2 are not. *Coleman v. Gulf Ins. Group*, 41 Cal. 3d 782, 806 n.9 (1986) (Bird, C.J., dissenting); *see also*  
3 *Travelers Ins. Co. v. Budget Rent-A-Car Sys., Inc.*, 901 F.2d 765, 771 (9th Cir. 1990) (describing  
4 insurance companies as “institutional litigants”). Thus, if UP were denied the opportunity to present its  
5 arguments and authorities, from the perspective of a policyholder advocacy group steeped in insurance  
6 law, while Oregon Mutual, an insurer, retained its position as the only institutional litigant in this case,  
7 the Court then would be deprived of a symmetry of advocacy necessary for the fair and even-handed  
8 development of COVID-19 insurance law.

9 There is no downside to granting UP’s motion for leave to file the amicus brief. In this Circuit,  
10 courts have routinely “held it is ‘preferable to err on the side of permitting amicus briefs.’” *Earth Island*  
11 *Institute v. Nash*, 2019 WL 6790682, at \*2 (E.D. Cal. Dec. 12, 2019) (quoting *Duronslet v. Cty. of Los*  
12 *Angeles*, 2017 WL 5643144, at \*1 (C.D. Cal. Jan. 23, 2017), and in turn citing *Neonatology Assocs.*,  
13 *P.A. v. C.I.R.*, 293 F.3d 128, 133 (3d Cir. 2002) (Alito, J.)) (brackets and some quotation marks  
14 omitted). This is so because “if the filed amicus brief ‘turns out to be unhelpful,’ the court ‘can then  
15 simply disregard’ it.” *Id.* (quoting *Cal. v. U.S. Dep’t of Labor*, 2014 WL 12691095, at \*1 (E.D. Cal.  
16 Jan. 14, 2014)). “On the other hand, if a good brief is rejected, the [Court] will be deprived of a resource  
17 that might have been of assistance.” *U.S. Dep’t of Labor*, 2014 WL 12691095, at \*1. Moreover, UP  
18 would likely be granted leave to file an *amicus* brief before the Ninth Circuit on this issue and would  
19 raise the same arguments as it does here; there is no value in depriving the district court of policyholder  
20 insights and advocacy that will be available to the Ninth Circuit on appeal when reviewing this Court’s  
21 reasoning.

22 Finally, contrary to Oregon Mutual’s assertion (for which the insurer cites no authority), UP’s  
23 *amicus* brief is not untimely. Rather, UP filed its motion for leave to file the *amicus* brief and the  
24 proposed *amicus* brief ten days in advance of the hearing on Oregon Mutual’s motion to dismiss. *See*  
25 *Nash*, 2019 WL 6790682, at \*1-2 (authorizing filing of *amicus* brief “filed a week before the hearing on  
26 the pending motion for preliminary injunction”).

1 **CONCLUSION**

2 For these reasons, United Policyholders asks this Court to grant its motion for leave to file an  
3 *amicus curiae* brief.

4 DATED: December 9, 2020

Respectfully submitted,

5 COVINGTON & BURLING LLP

6 By: /s/ David B. Goodwin

7 David B. Goodwin

8  
9 Attorney for Amicus Curiae  
10 UNITED POLICYHOLDERS  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26